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FILED.
DEC 14 1959
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IN THE

Supreme Court of the United States

OCTOBER TERM—1959

No. 587

FRED WILLIAMS,
Petitioner,
vs.
WALTER A. SAHLI, District Director of Immigration and Naturalization at Detroit, Michigan,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays for a Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Sixth Circuit which affirmed a judgment of the United States District Court for the Eastern District of Michigan, Southern Division. The District Court dismissed Petitioner's Complaint seking judicial review of a final order

entered by the Board of Immigration Appeals on May 14, 1958, denying Petitioner an opportunity to apply for, and be heard on his application for suspension of deportation.[1]

OPINIONS BELOW

No printed opinion was filed by the Court of Appeals. Copy of the Court's order of affirmance is annexed hereto. The opinion of the District Court is reported at 166 F. Supp. 734.

JURISDICTION

The order of affirmance by the Court of Appeals was entered on October 16, 1959. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, U.S.C. Sec. 1254.

QUESTIONS PRESENTED

I. Where, as here, the alleged alien, in the course of deportation proceedings, challenges in good faith the assertion of his alienage, may he nevertheless, be required to execute an application for suspension of deportation and file the same with the Special Inquiry Officer at his deportation hearing, notwithstanding the form of application requires that he swear that he is an alien and is deportable?

II. Does Section 244 (a) (5) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1254 (a) (5)) automatically make ineligible for suspension of deportation,

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[1] Petition for Certiorari to review the final order of deportation against Petitioner was denied by this Court on April 28, 1958 (Oct. Term, 1957, No. Misc. 560, 356 U. S. 946), *sub. nom. Williams v. Malcolm*.

any alien found to have been a member of the Communist Party within the ten-year period immediately prior to his deportation proceeding, regardless of the circumstances surrounding such membership?

STATUTES INVOLVED

Section 244 (a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1254(a), provides:

> "As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who * * *
>
> "(5) is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17) or (18) of section 241(a) for an act committed or status acquired subsequent to such entry into the United States or having last entered the United States within two years prior to, or at any time after the date of enactment of this Act, is deportable under paragraph (2) of section 241(a) as a person who has remained longer in the United States than the period for which he was admitted; has been physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and proves that during all of such period he has been and is a person of good moral character; has not been served with a final order of deportation issued pursuant to this Act in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation; and is a person whose deportation would, in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen or an alien lawfully admitted for permanent residence."

STATEMENT OF THE CASE[2]

On or about January 30, 1958, and prior to filing his previous Petition for Certiorari, Petitioner filed with the Board of Immigration Appeals a verified Motion to Reopen deportation proceedings (App. 13a)[3] for the purpose of permitting him to present evidence bringing his case within this Court's holding in *Rowoldt v. Perfetto*, 355 U. S. 115, 78 S. Ct. 180.[4] The Board's decision on this motion was delayed until after the denial of certiorari and then was denied.

Following the denial of certiorari and on May 9, 1958, Petitioner filed with the District Director at Detroit his Motion to Set Aside Final Order and Permit Application for Suspension of Deportation, under Title 8, U.S.C.A. Sec. 1254 (a) (5) (App. 8a). This motion was accompanied by Petitioner's affidavit (required by the Regulations 18 C.F.R. 8.11, (Rev. 1952)), in which Petitioner stated:

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[2] Petitioner incorporates by reference herein the background facts set forth on pages 2-8 of Petitioner's previous Petition for Certiorari (Oct. Term, 1957, No. Misc. 560).

[3] "App. ——" refers to the appendix to Petitioner's brief in the Court of Appeals.

[4] His verified Motion to Reopen stated that he always had been told and led by his parents to believe that he was a native-born citizen, born at Plymouth, Pennsylvania. His school records, the entry in the family Bible and the delayed birth certificate obtained in 1943 upon the affidavits of his father, his school principal and others, confirmed this belief. He stated also that because of this belief, he had consistently and erroneously exercised the rights of citizenship by voting and being a candidate for public office; and he had joined the Communist Party under the mistaken belief that, as an American citizen he had a right to do so. He first became aware in 1954, that a question existed as to his citizenship and this was when he was arrested by the Immigration Service. He had already left the Party.

> "I have not heretofore applied for suspension of deportation. I refrained from doing so because my honest belief is that the final order of deportation was invalid and that it was not established that I was an alien. The action of the Courts have now foreclosed that issue." (App. 10a.)

The affidavit incorporated by reference Petitioner's previous sworn representations contained in his abovementioned Motion to Reopen and also stated that at the hearing on his application for suspension he would testify that he joined the Communist Party in the 1930's under the mistaken belief, held in good faith, that he was a native-born citizen and had a right to do so; that "Following the enactment of the Taft-Hartley Act" (June, 1947), his Local Union "required that all officers execute the Taft-Hartley affidavit disclaiming membership in the Communist Party. I thereupon discontinued my membership in that organization and executed the affidavit as shown by the attached Exhibit 'A' which I issued to all members of my Local Union" (App. 11a and 29a).

The Decision of the Board

The Motion to Set Aside Final Order was denied by the Board of Immigration Appeals on May 14, 1958, five (5) days after it had been filed with the District Director at Detroit.

The decision of the Board (App. 21a) recites that "It is the rule that an application for suspension of deportation must be submitted in the course of the deportation hearing. The respondent did not apply for such relief during the hearings."[1] The decision then refers to the facts set forth in Petitioner's affidavit relating to the termination of his Party membership and interprets those facts as indicating that Petitioner did not leave the Communist Party until

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[1] Cf. 8 C. F. R. 242.54(d), Rev. 1952.

"shortly prior to August 8, 1950, when he filed an affidavit under the Taft-Hartley Law." In support of this conclusion the Board states that "the uncontradicted evidence of record establishes that the respondent had been a member of the Communist Party from 1932 to 1949. There is nothing in his affidavit to indicate that his membership terminated earlier than 1949."

The Board then concludes:

> "An applicant for suspension of deportation who is charged with having been a member of a subversive organization is required to prove that he has not been a member of a subversive organization for ten years preceding his application for suspension of deportation. Obviously, the respondent cannot do this. No purpose would therefore be served in reopening proceedings to enable him to apply for suspension of deportation."

The Proceedings in the Court Below

The Complaint filed in the District Court on May 27, 1958 recounted the salient background facts mentioned above and alleged in paragraph 11 as follows:

> "Plaintiff is informed and believes and states that, pursuant to Title 8 U. S. C. A., Section 1254 (a) (5), he has the right to apply to the Board of Immigration Appeals for a suspension of deportation because of extreme hardship; and that where a final order of deportation is outstanding the accepted practice and procedure before said Board is that the applicant shall first file with the Board a motion to set aside said final order for purposes of permitting the applicant to apply and to offer evidence in support of his application for suspension of deportation."

The Complaint charged that the action of the Board in denying Petitioner's motion "was arbitrary, capricious and an abuse of the discretion given by law to said Board and is contrary to law and constitutes a denial of plaintiff's rights under the Federal Constitution and the laws of the United States." The Court below was asked to set aside the Board's decision, direct the Board to entertain a properly executed application for suspension; and grant Petitioner an administrative hearing on said application.

The cause proceeded to a hearing on the merits on August 5, 1958. Petitioner testified that he was 52 years of age; that he was divorced; that he had one married daughter, 27 years of age, and two grandchildren, all of whom were native-born United States citizens. Also that he has a father, 79 years of age, and two brothers and 4 sisters, all of whom reside in Pennsylvania (App. 35a-36a). These are his only relatives.

Petitioner further testified that up until the time that he was arrested by the Immigration Service, he was always led to believe and did believe that he was born in Plymouth, Pennsylvania. He was told this by his parents and this was the information contained on the work permit issued to him in Pennsylvania when he was 14 years of age. This, likewise, was the information contained on the delayed birth certificate which he received in 1943 from the State of Pennsylvania (Appendix 37a-38a). A photostat copy of this certificate, received in evidence (Plaintiff's Exhibit No. 2, App. 60a) states that Petitioner was born in the Township of Plymouth, Pennsylvania on May 7, 1906 and that his date and place of birth is documented by the records of the Plymouth School, the affidavit of Petitioner's father, the entry in the family Bible, and the affidavit of

residents of Plymouth, Pennsylvania, who certify that they are familiar with the facts."

Petitioner also testified that he first joined the International Labor Defense, an organization which devoted itself to "getting people out of jail, who were arrested at welfare stations" (App. 43a). While in this organization he was asked to join, and did join the Communist Party in 1931. At that time he believed that he was a citizen and had a right to join if he wished (App. 42a). During that time and for many years prior thereto he was interested and active in the labor movement and was helping to organize his fellow auto workers into unions. He joined the Communist Party because he thought "it was the organization that would lead to organizing auto workers" (App. 43a).

In the years that followed he became an International Representative of the UAW-CIO and Business Agent for one of the Union's Detroit Locals (App. 41a). During this same period he held various official positions in the Communist Party of Michigan (App. 44a), including membership in the State Committee. Petitioner testified that at no time during his membership in the Communist Party did that organization, to his knowledge, teach and advocate the violent overthrow of the Government. He had never engaged in such advocacy nor did he recall any time that anyone in his presence at any Communist Party meeting engage in such advocacy (App. 44a).

Petitioner's testimony fixed the time of his disassociation with the Communist Party as occurring in 1947 and shortly after the Taft-Hartley Act was passed in June, 1947 (App.

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[6] The exhibits before this Court in Petitioner's prior proceedings show that Petitioner represented Pennsylvania as his place of birth at the time of his marriage application; that he had consistently voted as an American citizen and was a candidate for public office in Michigan in 1946.

47a). He recalled that when that Act was passed he was business agent of his local union and a question arose as to whether local unions were required to comply with the Act; whether its officers were required to execute Taft-Hartley affidavits. His local voted against compliance (App. 45a-47a).

He further testified that he paid no dues to the Communist Party after the Taft-Hartley Act was passed, nor did he attend any of its meetings, nor accept any responsibility, nor perform any duties for the Communist Party after the Taft-Hartley Act was passed (App. 47a). He recalled a conversation "sometime after" the passage of the Act, in which he told the leaders of the Party that he "was put in a position of choosing whether I wanted to continue in the Labor movement, and do what I thought was right, as far as the Labor movement was concerned, or stay within the Communist Party, and I said that I chose to stay in the Labor movement, and that's the way it happened, and I ceased to be a member."

Petitioner categorically denied the uncorroborated testimony given by a witness (Mrs. Baldwin) at his deportation hearing that she had seen him at a closed Party meeting in 1948 and again in 1949 (App. 47a-48a). He stated that he attended no Party meetings after his disassociation with that organization in 1947.

In August, 1950, Petitioner executed a Taft-Hartley affidavit under the following circumstances, according to his testimony: The 1947 decision of his Local Union not to require Taft-Hartley affidavits of its officers, remained in effect until 1949 when a new set of local officers was elected and petitioner's position of Business Agent was abolished (App. 61a-62a). The new administration reversed the Local's position on Taft-Hartley affidavits and made it a

condition that everyone seeking Local Union office must execute a Taft-Hartley affidavit. In the 1950 Local Union elections, petitioner was nominated for the Vice-Presidency of his Local Union, and on August 8, 1950, he signed the Taft-Hartley affidavit affirming that he was not a member of the Communist Party (App. 61a-62a). He then issued and circulated a mimeographed leaflet (Ex. 3, App. 29a) to the Local Union membership "explaining why I signed it" (App. 62a).

Petitioner stated that he had not testified at his deportation hearing because "he had never known other than that" he was a citizen; he thought the whole question of his alienage "was ridiculous." He did not testify as to membership in the Communist Party because "at that time the Smith Act trials were going on" and his counsel informed him that he could exercise his right not to testify "if I didn't care to." But durinng the period of his membership in the Party it was a matter of general knowledge (App. 63a-64a).

On his examination by the Court (App. 49a), Petitioner stated that the place of his birth was first told to him by his mother and father; that his first schooling was at the age of six when he entered school at Plymouth, Pennsylvania, and that he attended school there partly through the eighth grade and until he was 14 years of age when his father told him he would have to go to work because there were ten in the family. He had no recollection of having been told in school "anything about American government and American history" (App. 51a-54a). At the age of 14 he obtained regular employment in a patent medicine shop and thereafter worked successively in a silk mill, an iron works, and in the coal mines. He has never been to Europe (App. 54a).

The testimony of Petitioner's daughter, Mrs. Campbell (App. 67a), is to the effect that she had always understood

and represented as a fact that her father was born in Plymouth, Pennsylvania and that the first inkling she had that there was any question as to his place of birth was at the time he was served with the warrant in his deportation proceeding.

In his opinion of September 26, 1958, the District Judge points out that, "plaintiff was brought to America by his parents while an infant." The Court also found that "His parents never told him he was not born in America" (App. 76a). "The record indicates that the plaintiff had an honest belief that he was a native-born citizen * * *. It was but natural for him to assume he had the right of freedom of thought, freedom of expression and freedom of association. Had he been born a year later he could not now be banished to a foreign land for exercising those rights." "Like many other judges, I find it difficult to reconcile some of the provisions of the Nationality Act with our American concepts of justice, fair play and the humane treatment of individuals" (App. 78a-79a).

However, the District Judge concluded:

> "That portion of the statute allowing suspension of deportation requires, among other things, that petitioner 'has not been served with a final order of deportation issued pursuant to this Chapter in deportation proceedings up to the time of applying to the Attorney General for suspension of deportation.' (8 U. S. C. A. 1254 (a) (5). It is conceded that the plaintiff did not apply for suspension during the four years the matter was pending in the Courts.
>
> In view of the fact the defendant concedes plaintiff left the Communist Party prior to 1950, one could conclude this was the kind of situation that prompted Congress to insert the humane provision in the Act authorizing the Attorney General to sus-

pend deportation in cases of " " " exceptional and extremely unusual hardship to the alien.

This is a matter, however, that rests in the discretion of the Attorney General. He still has the authority to suspend deportation in this case.

Counsel for plaintiff attempted to explain his failure to comply with this provision on the ground that in other cases, the Board has set aside the final order of deportation to allow petitioner to file application for suspension. Further, he pointed out that a strict interpretation of the statute requires that the application be filed during the hearings regardless of the basis upon which the proceedings were being contested.

The wisdom of this provision of the Act is not for the Courts to determine " " " If the Act is to be changed, it must be changed by Congress. The plaintiff has failed to comply with the Act. It cannot be said that the Board's refusal to disregard this provision was an abuse of discretion. It therefore follows that the Complaint must be dismissed." (Emphasis supplied.)

The Court of Appeals accepted the view of the Board of Immigration Appeals that Petitioner "would be unable to prove that he had not been a member of a subversive organization for ten years preceding his application for suspension of deportation as required by Sec. 244 (a) (5) of the Immigration and Nationality Act, (8 U.S.C. [illegible] (5))."

The Court, affirming dismissal of the Complaint, concluded that Petitioner "had failed to make timely application for suspension of deportation as required by law and to establish that the Board acted arbitrarily " " "

REASONS FOR GRANTING THE WRIT

This case presents questions important to the proper administration of the Immigration and Nationality Act of 1952, which questions have not previously been ruled upon by this Court. These questions are:

I. Where, as here, the alleged alien, in the course of deportation proceedings, challenges in good faith the assertion of his alienage, may he, nevertheless, be required to execute an application for suspension of deportation and file the same with the Special Inquiry Officer at his deportation hearing, notwithstanding the form of application requires that he swear that he is an alien and is deportable?

II. Does Section 244 (a) (5) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1254 (a) (5) automatically exclude from consideration for suspension of deportation any alien found to have been a member of the Communist Party within the ten-year period immediately prior to his deportation proceeding, regardless of the circumstances surrounding such membership?

We discuss here each of these two questions.

I.

The regulations of the Service provide that the application for suspension be submitted at the deportation hearing (8 C.F.R. 242.54(d)). They require that the application be made upon official Form I-256A, furnished by the Service and introduced in evidence here as Plaintiff's Exhibit No. 1. This form, which must be submitted under oath and documented, is a six page comprehensive inquiry

into the entire personal history of the applicant, his and his parents' place of birth and nationality, his assets, and his organizational affiliations. The form must be signed and acknowledged by the applicant in the presence of the Special Inquiry Officer "in the course of the deportation hearing." In addition, the applicant is warned that false answers knowingly made entail severe criminal penalties and that "Your answers to any of the questions in this form may be used as evidence in any proceedings to determine your right to * * * reside in the United States."

The first question on the application form is:

> "I, ..., an alien, believe
> Name
> that I am in the United States in violation of the Immigration laws for the following reason(s): * * *."

The mere execution and filing of the application for suspension at the hearing and before final order, requires a conscious sworn admission that the applicant is an alien and is deportable. These are precisely the issues which the Special Hearing Officer is called upon to decide on the basis of the proofs presented at the deportation hearing before he can determine that the applicant is deportable.

Without impugning the integrity or the impartiality of a Special Inquiry Officer, no great measure of skepticism is needed to assess the impact such sworn detailed admissions by the accused are bound to have upon that officer's ultimate decision.

Thus, the entire concept of a fair deportation hearing is vitiated. Particularly is this evident where, as here, a re-

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This form has since been revised and the revised form was [illegible] by the Service with the Court of Appeals. It likewise requires [illegible] tion 1 an admission of alienage.

age—an objective fact—is an issue contested in good faith and the applicant, in order to be considered for suspension, is required to concede his alienage as the price for being considered for suspension.

If the suspension statute is interpreted to produce such a result, then obviously such a person cannot have a fair and impartial deportation hearing before a fair and impartial Special Inquiry Officer.

The statute (Sec. 244(a) (5)), literally interpreted, might be said to require this result; for it requires, among other things, that an applicant for suspension be one who "has not been served with a final order of deportation in deportation proceedings." The Service, however, recognizing the unfairness which such a literal interpretation produces, has on numerous occasions avoided such a literal interpretation by the simple expedient of granting a motion to re-open, permitting the final order to be withdrawn and allowing application for suspension to be filed.

Thus, in his 1958 brief (note 14, p. 23) filed with this Court in *Bonetti v. Rogers*, 356 U. S. 691, the Solicitor General advised the Court that the alien was not precluded "from seeking the discretionary relief of suspension," notwithstanding no application was made at the hearing and the "final order" entered by the Board in 1952 had been affirmed by both the District Court and the Court of Appeals; and notwithstanding, a motion to reopen, filed by the alien while judicial review was pending, previously had been denied by the Board. (Decision of the Board in *Matter of Bonetti*, No. A-12273106—Los Angeles, decided June 7, 1956.)

Similarly, in *Garcia v. Landon*, 348 U. S. 866, the case was mooted by the Government in this Court after the service itself had asked the Board to withdraw the final

order of deportation and afford the alien an opportunity to apply for suspension. Later, when suspension was denied, the alien again applied to the Courts and the Service again requested the Board to reopen for suspension. This request was granted and the Board "directed that his case be placed in the non-priority inactive category with no further administrative proceedings to be taken." (Supplemental Memorandum of Solicitor General in *Rowoldt v. Perfetto, supra.*) (See also *Jay v. Boyd*, 351 U. S. 345.)

It seems reasonably clear, therefore, that the basis for the Board's decision here was not the alleged tardiness in seeking suspension; but rather, the Board's subsequent conclusion that Petitioner could not qualify for consideration for suspension even if given an opportunity to apply for suspension and to have a hearing on his application.

II.

In denying Petitioner's motion to set aside the final order and permit application for suspension to be filed and heard, the Board actually was making a decision on the merits of Petitioner's proposed application for suspension; notwithstanding such an application was not before the Board. The Board, in effect, treated the motion as though it were an application for suspension and undertook to apply to the motion papers the eligibility standards which the suspension statute provides, without according to Petitioner an opportunity to be heard and to present proofs. Yet it is established both by the Regulations of the Service and prior decisions of this Court (*Jay v. Boyd*, 351 U. S. 345), that, while the grant of suspension is an act of grace, the applicant is entitled to a hearing to enable him to establish, if he can, his eligibility to be considered for suspension. (8 C. F. R. 244.2; 242.61.)

If the record before the Board (including the affidavits and documents proffered by Petitioner in his Motion to Reopen (App. 13a) and his Motion to Set Aside Final Order (App. 8a) could be said to conclusively demonstrate that under no circumstances could Petitioner meet the statute's requirements for eligibility for suspension, then it might be said that the action of the Board in denying a hearing was justified. The Board, of course, is not required to do a useless act.

Petitioner contends, however, that the state of the record before the Board at the time the Board assumed to rule upon Petitioner's eligibility for suspension was such that a hearing and additional findings became mandatory.

The Board held that, on the basis of the deportation record before it, Petitioner could not possibly meet the eligibility requirement of good moral character contained in the suspension statute. This was error. The statute requires that the applicant for suspension must have been:

> "* * * Physically present in the United States for a continuous period of not less than ten (10) years immediately following the commission of an act, or the assumption of a status constituting a ground for deportation, and proves that during all of such period he has been a person of good moral character * * *"

The Board's decision (App. 22a) interprets this standard to mean that:

> "* * * An applicant for suspension of deportation who is charged with having been a member of a subversive organization is required to prove that he has not been a member of a subversive organization for ten (10) years preceding his application for suspension of deportation."

There is no warrant in the Act for such an interpretation. Indeed, the statute itself negates such a conclusion.

First, the Immigration and Nationality Act (8 U. S. C. A. 1251(a) (6) (C), (D), (E) and (F)), makes a material difference between Communist Party membership and membership in a subversive organization; and the nature of the proofs required highlights this difference. Thus, with respect to the former—membership in the Communist Party—(Sec. 1251(a) (6) (C)—it is sufficient that the proofs show that he committed himself to the Communist Party in consciousness that he was 'joining an organization known as the Communist Party which operates as a distinct and active political organization.' *Rowoldt v. Perfetto, supra.* But, as to the latter—a "subversive" organization—Sec. 1251 (a) (6) (D, E and F), the proofs must show the character of the organization and its advocacy and the alien's knowledge of the same. Cf. *Yates v. United States*, 354 U. S. at 319-322 and *Nowak v. United States*, 356 U. S. 360.

The warrant of arrest for Petitioner's deportation did not charge him with membership in "a subversive organization;" it charged membership in "the Communist Party." Thus, in order to establish the deportability of Petitioner under the charge made in the warrant, it was not necessary for the service to show, and the record before the Board here was devoid of any showing as to the claimed subversive character of the Communist Party and Petitioner's knowledge of the same during the period of his admitted membership therein. See *Galvan v. Press*, 347 U. S. 522 (1954). But without such evidence before it, the

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[8] As the Supreme Court observed in *Kent v. Dulles*, (78 S. Ct. 1113 at note 3, decided June 16, 1958) "the conditions precedent" to labeling the Party as a "subversive" organization under Federal Law (Internal Security Act, 50 U. S. C. 781, 785) "have not yet materialized".

Board could not conclude that a record showing only officership in and attendance at Communist Party membership meetings was tantamount to a showing of membership in a "subversive organization." Cf. *Wieman v. Updegraff*, 344 U. S. 183. To do so is more than a conclusion based upon facts not in evidence; it is a *conviction* upon a charge not made—the sheerest denial of due process. *Cole v. Arkansas*, 333 U. S. 196 and *DeJonge v. Oregon*, 229 U. S. 333, 362.

Second. The second impermissible assumption which the Board's equation presents is that membership in the Communist Party *per se* denotes lack of good moral character. As to this assumption, it is sufficient to refer to this Court's decisions in *Konigsberg v. California*, 353 U. S. 252, 77 S. Ct. 722, 730 and *Schware v. New Mexico*, 353 U. S. 232, 77 S. Ct. 752, 759, 762, holding that even active membership in the Communist Party does not *per se* justify an inference that one had bad moral character.

The Service contended in the Court below (Gov't. Br., pp. 26-27) that Petitioner is in error

> "• • • in assuming that the Board found that the requisite good moral character was negated by Communist Party membership during the ten year period. Rather it decided that the ten year period could commence only after termination of Communist Party membership and that the evidence in the record showed that he (Williams) had been a Communist Party member within the ten year period."

We submit that the Board's holding is susceptible to both of these interpretations—the one ascribed to it by Petition and the one offered by the Service—and that in either instance the Board has misinterpreted the statute on its face and as applied to Petitioner.

For the suspension statute does not in terms require a showing of disassociation from Party membership prior to the good moral character period. And the only conceivable basis for reading such a requirement into the statute is the apparent notion of the Board that membership in the Communist Party is incompatible with good moral character. Thus, as interpreted by the Service, what the Board actually is saying is that Petitioner could not under any circumstances show good moral character for the ten year period prior to his 1954 deportation hearing because the evidence at his deportation hearing showed membership and officership in the Communist Party during a portion of this period.

If the Service has correctly set forth the Board's interpretation of the statute's good moral character period as commencing with the termination of the status which gave rise to the order of deportation, i. e., Party membership, and continuing up to the deportation hearing, then the Board clearly has misinterpreted the plain letter and intent of the suspension statute, and has imported into the eligibility requirements of the statute considerations which Congress intentionally excluded. Such action by the Board is more than an abuse of discretion (Cf. *Accardi v. Shaughnessy*, 18 F. 2d 489-490-491), it is a denial to this Petitioner of due process of law.

The statutory language (80 U. S. C. A. 1254(a)(5) is that the applicant for suspension must have been

> "physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act *or the assumption of a status constituting ground for deportation*, and proves that *during all such period* he has been and is a person of good moral character * * *." (Emphasis supplied.)

"Assumption" is defined as the "act of taking for or upon oneself." (Webster's International Dictionary (2nd Ed.) p. 168.) "Assumption" thus means the "beginning"; it clearly does not mean the "termination." Congress has used the ascertainable act of beginning a status (i. e., joining the Communist Party), rather than the frequently unascertainable and ofttimes indefinite act of terminating a status, to mark the start of the good moral character period. Thus, by reading "assumption" as though it were "termination," the Board automatically excludes from the suspension section of the Act every alien who has been disassociated with the Communist Party for a period of less than ten years prior to his deportation hearing, regardless of the nature of such membership or the circumstances under which it existed.

This, however, is contrary to the Congressional intent; for as the opinion of this Court in *Rowoldt v. Perfetto*, 355 U. S. 115, 78 S. Ct. 180, points out, Congress has put a gloss on the term "Communist Party member" as used in the Act—a gloss which clearly shows that wholesale application of the Act's deportation provisions to Communist Party members, *as a class*, and without reference to the circumstances surrounding such membership in each case, was not the intent of Congress. If this be true with respect to the drastic deportation provisions of the Act, there is even greater warrant for the same individual consideration as respects the application of the humane provisions embodied in the suspension statute.

There is additional indication in the Act that Congress did not intend such wholesale exclusion of Communist Party members from this humane provision of the Act; that, instead, Congress intended that the question of suspension should be determined in such instance on a case-by-case basis.

Thus, while Section 1101 (f) of Title 8 U. S. C. A., sets forth the "yardstick" for a finding of good moral character and specifically excludes such a finding with respect to certain deportable or excludable aliens *as a class*, it does not mention persons deportable for organizational membership. Obviously, had Congress intended the wholesale exclusion of this class of deportees, it need only to have included *the class* in this list of exceptions.

Again, and as to persons not in the expressly excluded classifications, Section 1101 (f) (8) of the Act provides that the Board is not precluded from making a finding of lack of good moral character "for other reasons." This reference to "for other reasons," we submit, plainly means for reasons other than those which constitute the ground for deportability, i. e., organizational membership.

Finally, the interpretation of the Act which the Service has attributed to the Board would produce practical results hardly intended by Congress. An alien who has lived in our Country for fifty years and who applies for suspension at his deportation hearing which occurs within nine years from the termination of his Party membership, must be denied suspension regardless of the duration or the circumstances surrounding such membership; since there would not be ten years from the date of *termination* of such membership. But an alien who has lived here only twelve years and who applies for suspension at his deportation hearing which occurs ten years after the termination of his Party membership, is entitled to show his good moral character and hardship and thus qualify for suspension. And it would make no difference that in the former case the alien believed in good faith that he was a citizen, whereas in the latter case alienage was unchallenged. Surely, such a miscarriage of justice was never contemplated by Congress.

We submit that the proper interpretation of the good moral character time period in the suspension statute, on its face and as applied here, means the following:

(a) The applicant must show that he has resided in this country continuously for *at least ten years immediately following the time that he became a member of the Communist Party;* and

(b) He must show that during the entire period of such residence (which may exceed ten years and which necessarily would embrace the period of his Party membership) he has been and is a person of good moral character.

We submit further that the record of Petitioner's deportation hearing was completely devoid of any evidence concerning Petitioner's character, or the character of the Party or Petitioner's activity in the Party; and, hence, the Board could not conclusively presume, as it did, that Petitioner, if granted a hearing, could not meet the good character requirements. On the contrary, the showing made by the Petitioner in his affidavit to the Board (App. 9a) and in his testimony before the District Court, demonstrates that he can meet each of the eligibility requirements of the suspension statute if that statute is properly interpreted.

CONCLUSION

The Writ of Certiorari should issue and the judgment below should be reversed.

Respectfully submitted,

GOODMAN, CROCKETT, EDEN and ROBB,
By: GEO. W. CROCKETT, JR.,
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Dated: December —, 1959.

APPENDIX

No: 13,762

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

Frederick J. Williams,
Appellant,
v.
Walter Sahli, District Director of Immigration and Naturalization at Detroit, Michigan,
Appellee.

ORDER

(Filed October 16, 1959)

Before: McAllister, Chief Judge, Martin, Circuit Judge, and Wejck, District Judge.

An order of deportation was entered against appellant which was affirmed by the Board of Immigration Appeals on August 27, 1954. The District Court upheld appellant's deportation. 145 F. Supp. 567. This Court affirmed. 250 F. 2d 427 (CA 6, 1957). Certiorari was denied by the Supreme Court on April 28, 1958 (356 U. S. 946) and rehearing denied on May 26, 1958.

Appellant filed with the Board of Immigration Appeals on January 30, 1958 a motion to reopen the deportation proceedings and on May 9, 1958 filed with the District Director at Detroit a motion to set aside the final order of deportation to permit him to make application for suspension of deportation.

The Board of Immigration Appeals denied appellant's motion to reopen on May 14, 1958 which was upheld by the District Court and resulted in this appeal.

It was undisputed that appellant did not make application for suspension of deportation to the Board of Immigration Appeals prior to being served with the order of deportation as required by Section 244(a)(5) of the Immigration & Nationality Act of 1952 (8 U. S. C. §1254(a)(5)) and by the regulations issued in pursuance thereof. (8 C. F. R. §242.16(c) and §244.2.)

The Board pointed out that no useful purpose would be served in reopening the case as the record established appellant's membership in the Communist Party from 1932 to 1949 and that he, therefore, would be unable to prove that he had not been a member of a subversive organization for ten years preceding his application for suspension of deportation as required by Section 244 (a)(5) of the Immigration and Nationality Act (8 U. S. C. §1254(a)(5)). See: Williams v. Mulcahey, 253 F. 2d 709 (4 Cir. 1957).

Appellant was not entitled to suspension of his deportation as a matter of right. It was solely within the discretion of the Board. Section 244 Immigration & Nationality Act of 1952, 8 U. S. C. 1254, *U. S. ex rel. Mintopoulos v. Shaughnessy*, 353 U. S. 72, 77 (1957), *Jay v. Boyd*, 351 U. S. 345 (1956).

Appellant has not established to our satisfaction that the Board abused its discretion in refusing to reopen the case.

In view of appellant's failure to make timely application for suspension of deportation as required by law and to establish that the Board acted arbitrarily, the District

Court was right in dismissing the complaint. The judgment below is, therefore, affirmed.

Approved for entry:

/s/ Paul C. Weick,
United States Circuit Judge.

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FILED
JAN 13 1960
JAMES R. BROWNING, Clerk

No. 587

In the Supreme Court of the United States

OCTOBER TERM, 1959

FRED WILLIAMS, PETITIONER

v.

WALTER A. SAHLI, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. 25-27) is not reported. The opinion of the district court (R. 72a-80a) is reported at 166 F. Supp. 734.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1959. The petition for a writ of certiorari was filed December 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board of Immigration Appeals properly declined to revoke an order of deportation and reopen the proceedings in order to enable petitioner to apply for suspension of deportation, where the Board found that petitioner failed to allege facts showing his eligibility for such relief.

STATEMENT

In deportation proceedings in 1954, petitioner, a British national, was found to have been a member of the Communist Party from 1931 to 1949 and was ordered deported under § 241(a)(6)(C) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.* (R. 3a, 21a). The order was sustained in review proceedings. *Williams* v. *Butterfield*, 145 F. Supp. 567 (E. D. Mich.), affirmed *sub nom. Williams* v. *Malcahey*, 250 F. 2d 127 (C.A. 6), certiorari denied, 356 U.S. 946.

Thereafter, on May 9, 1958, petitioner moved the Board of Immigration Appeals to vacate the order and reopen the proceedings to permit him to apply for suspension of deportation under § 244(a)(5) of the Act (R. 8a-12a). The motion, which incorporated by reference (R. 9a-10a) the allegations of a prior motion on another ground (R. 13a-19a), offered to prove the following facts as to petitioner's Communist Party membership (R. 11a, 16a):

> Following the enactment of the Taft-Hartley Act in ——, my Local Union—Local 208, UAW CIO, of which I was the business agent—required that all officers execute the Taft-Hartley affidavit

disclaiming membership in the Communist Party.[1] I thereupon discontinued my membership in that organization and executed the affidavit as shown by the attached Exhibit "A" which I issued to all members of my Local Union. [The attached exhibit stated: "On August 8th, 1950 * * * I signed the affidavit * * *" (R. 29a).]

I am not now, nor have I been at any time since the above affidavit was executed, a member of the Communist Party.

* * * * *

Prior to the time of his arrest by the Immigration Service in May, 1954, Petitioner had voluntarily discontinued all membership or affiliation with the Communist Party and he has not engaged in any Communist Party activity since 1950.

The Board, noting that petitioner had not complied with the requirement that suspension applications be submitted before the final order of deportation is entered, denied the motion. It pointed out that the uncontradicted evidence of record established that petitioner had been a member of the Communist Party from 1942 to 1949, that it had been so found in the deportation proceedings, and that petitioner in his motion made no allegation that his membership terminated prior to 1949 (R. 21a-22a). The Board said (R. 22a):

* * * An applicant for suspension of deportation who is charged with having been a member of a subversive organization is required to prove that

[1] As petitioner later testified in the district court (R. 61a-62a) and admits here (Pet. 9-10), the Local did not require its officers to execute Taft-Hartley affidavits until 1949.

> he has not been a member of a subversive organization for ten years preceding his application for suspension of deportation. Obviously, the respondent cannot do this. No purpose would therefore be served in reopening proceedings to enable him to apply for suspension of deportation. * * *

Petitioner then brought this action to set aside the Board's order denying the motion. The district court (R. 72a-80a), affirmed by the court of appeals (Pet. 25-27), dismissed the complaint, finding that the Board had not abused its discretion in refusing to reopen the proceedings.

ARGUMENT

A sufficient ground for the Board's denial of petitioner's motion to reopen the proceedings was that he failed to allege facts which, if proved, would establish his eligibility for suspension.[2] To be eligible for suspension under § 244(a)(5), an alien must be "physi-

[2] Hence there is no occasion to reach the question whether the Board could, in its discretion, have refused to reopen the proceedings to entertain the tardy application even if the allegations had been sufficient. We note, however, that the reason proffered by petitioner for not having complied with the statutory requirement that the application be made before the final order of deportation—that he could not have so applied without admitting the then-contested issue of alienage—seems an inadequate justification for his delay. While the standard application form does, as petitioner claims (Pet. 14), recite "I [name] am alien", it is difficult to believe that petitioner, represented throughout by counsel, lacked the ingenuity to adapt the form to his case by crossing out the word "alien" and explaining that he disputed his alienage. The formal deficiency of the form to allow for the uncommon case in which alienage is in issue is hardly a sufficient reason for waiting until the eve of deportation, after four years of litigation, to apply for discretionary relief, frustrating the purpose of the statute to have the issues of fact going to deportability and to eligibility for suspension presented at one hearing.

cally present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation, and [prove] that during all of such period he has been and is a person of good moral character" (Pet. 3). It was found in the original deportation proceedings that petitioner had been a member of the Communist Party until 1949, and in his motion to reopen petitioner offered to prove only that he had not been a member "since the [Taft-Hartley] affidavit was executed" (August 8, 1950) or "since 1950" and that he had terminated his membership sometime after his local union required noncommunist affidavits to be filed (now admitted to have been in 1949). His motion and supporting affidavits, therefore, not only failed to allege that ten years had elapsed since the termination of his Party membership but affirmatively showed the contrary.[3]

Petitioner makes the novel contention that it is necessary only that ten years have elapsed since he *became* a member of the Party, not since he *terminated* his membership, and that continued membership during the ten-year period is relevant only in determining

[3] In the district court proceedings petitioner sought to show, contrary to the allegations of his motion to the Board, that he terminated his Party membership in 1947 (R. 45a-48a; Pet. 8-9). The question, however, is whether the Board erred in denying the motion on the offer of proof made to it, and the belated and contradictory allegation made in the district court is irrelevant. Moreover, termination of petitioner's membership in 1947 would still have been within less than ten years of the 1954 deportation proceedings, when the application for suspension was required to have been made, and there is a question whether, even if the untimeliness of his application were waived, petitioner could properly rely on the period of his delay to satisfy the ten-year requirement.

his "good moral character" during that period. The insubstantiality of that argument is shown by its bizarre implications: a longstanding member of the Party who had never resigned could satisfy the requirement while an alien who joined the Party within the ten-year period and resigned one month later could not. The error in petitioner's argument is that being a member of the Party is the "commission of an act," constituting a ground for deportation, not the "assumption of a status" as petitioner claims, and so long as the alien continues to commit that act his period of residence for suspension purposes cannot begin to run. The purpose of the suspension provision is to afford relief to aliens who, although having once committed acts for which they are subject to deportation, have demonstrated their rehabilitation by ten years of good behavior. It is clearly inconsistent with that purpose to allow relief to an alien who, during the ten-year period, continues to commit the very act for which deportation is prescribed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

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Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JANUARY, 1960.

U. S. GOVERNMENT PRINTING OFFICE 1960